No. 92-886

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AZUL PACIFICO, INC.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioner Azul Pacifico, Inc. ("Azul") files this memorandum in reply to the brief in opposition of respondent City of Los Angeles. As demonstrated in the following paragraphs, respondent has failed to overcome the compelling reasons supporting review by this Court of the exceedingly important and recurring issues presented by this case.

1. The decision below restricts victims of takings by local governmental entities to the remedy created by Congress in 42 U.S.C. § 1983. That limitation is inconsistent with several of this Court's decisions and the decisions of other circuits. Pet. at 13-19. Although respondent denies the existence of a conflict, Opp. at 10, its brief in opposition does nothing to refute it, and, indeed, further illustrates the existence of the conflict and the reasons why the Court should grant review.

a. Respondent first contends that review is unnecessary because the Ninth Circuit's holding on the § 1983 issue is consistent with this Court's analysis in *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). In fact, the Ninth Circuit's decision is flatly inconsistent with both *Davis* and *Carlson*.

In *Carlson*, the Court held that a prisoner's estate could bring a direct constitutional claim for Eighth Amendment violations despite the availability of alternative statutory relief under the Federal Tort Claims Act. 446 U.S. at 18-23. The Court held that unless "Congress has provided an alternative remedy which it *explicitly declared*," *id.* at 18 (emphasis added), to be "a *substitute* for recovery directly under the Constitution," *id.* at 18-19 (emphasis in original), the Court will *not* foreclose direct constitutional relief.

Respondent asserts that *Carlson* implicitly understood § 1983 to pre-empt all direct rights of action under the Constitution, Opp. at 12, but respondent does not even attempt to show that Congress "explicitly declared" that § 1983 is "a substitute" for takings claims brought directly under the Fifth Amendment. Nor could it possibly make such a show-

ing. There is, in fact, *no* indication that Congress intended § 1983 to limit or restrict the law of constitutional remedies in any way whatsoever, let alone to eliminate the only private remedy articulated explicitly in the Constitution. Indeed, the "express language of [the Just Compensation] Clause requires that 'compensation' be paid for any governmental taking," *Carlson*, 446 U.S. at 43 n.9 (Rehnquist, J., dissenting), and it would turn *Carlson* on its head to hold, as the Ninth Circuit did here, that Congress has implicitly overridden that explicit constitutional right.

Moreover, in *Davis*, which held that a sex discrimination claim against a Member of Congress could be maintained directly under the Constitution, the Court expressly recognized that the Fifth Amendment provides a constitutional remedy for just compensation that is neither dependent on nor eliminated by any statutory alternative. In explaining its holding in *Davis*, the Court unequivocally stated that "*Jacobs v. United States*, 290 U.S. 13 (1933), held that a plaintiff who alleged that his property had been taken by the United States for public use without just compensation *could bring suit directly under the Fifth Amendment*," 442 U.S. at 242 n.20 (emphasis added), even though *Jacobs* was decided after Congress had also authorized takings claims against the United States under the Tucker Act. *See* 290 U.S. at 13-16.

Thus, *Davis* and *Carlson* do not provide a basis for denying certiorari. On the contrary, the decision below is inconsistent with those cases and that is reason enough alone to warrant review by this Court.

b. Respondent's efforts to reconcile the Ninth Circuit's holding that Azul "has no [takings] cause of action directly under the United States Constitution," Pet. App. at 26a, with *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), are equally unsupported by law or logic. Respondent is forced to concede that *First English* made clear that the Fifth Amendment is " 'self-executing' " and that "the right to compensation is grounded in the Constitution itself and guaranteed by the Constitution," Opp. at 13, but nonetheless contends that "it does

not follow that a separate direct cause of action exists in addition to an available *statutory* remedy." *Id.* at 11 (emphasis in original). That is, however, exactly what follows from *First English*.

The court below also acknowledged, at least in its initial opinion, Pet. App. at 20a, that *First English* squarely held "that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.' " 482 U.S. at 315 (citation omitted).

Although the Court in *First English* did not expressly address the interplay between 42 U.S.C. § 1983 and the "remedy for interference with property rights amounting to a taking" that the "Constitution . . . dictates," 482 U.S. at 316 n.9, it did hold that the landowners in that case had stated a constitutional claim for just compensation, even though they had *not* invoked § 1983 either in the California courts or in this Court. The Court thereby implicitly rejected the concept that § 1983 could be the only vehicle for takings claims against non-federal governmental entities, the position that had been advocated by the United States in its *amicus* brief. *See* Brief for the United States as *Amicus Curiae* at i, 6, 17, 30-34, in No. 85-1199 (U.S. filed Nov. 4, 1986).

Respondent seeks to discount *First English* because that decision relied on *Jacobs*, 290 U.S. at 16, arguing that "since . . . *Jacobs*, this Court has ruled that § 1983 actions may be filed against local governments and municipal corporations, providing a remedy which was previously unavailable." Opp. at 13-14. But respondent's reliance on *Jacobs* makes no sense because the decision recognizing that municipalities are subject to § 1983 liability, *Monell v. New York City Dep't of Social Svcs.*, 436 U.S. 658 (1978), was rendered almost a decade before *First English* held that the Fifth Amendment affords a direct and independent constitutional remedy for just compensation. And the mere fact that § 1983 damages actions were not deemed "available" against municipalities until over 100 years after § 1983 was enacted is, in and of itself, strong proof that there is no "clear congressional man-

date," *Carlson*, 446 U.S. at 23, to substitute such actions for Takings Clause claims brought directly under the Constitution.[1]

c. Respondent does not take issue with Azul's contention (*see* Pet. at 15-19) that there is conflict and uncertainty among the lower courts concerning whether § 1983 is the only mechanism for asserting a takings claim. Rather, respondent resorts to a wholly tautological argument that the conflict is not sufficiently important to warrant review because the court below reached the correct result. For example, although respondent concedes, Opp. at 14, that the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), held that under *First English* "takings suits may be filed directly under the Constitution" as well as § 1983, *id.* at 468, it contends that the clear conflict between *Bieneman* and this case on the § 1983 issue is of no concern because *Bieneman* also concluded that direct takings claims are governed by the same statute of limitations as § 1983 claims. That argument, however, simply assumes that the Seventh Circuit's ruling on the statute of limitations issue was correct, which it is not. *See* Pet. at 19-25; *see infra* pages 5-7.

Similarly, respondent acknowledges (Opp. at 14 n.8) that the Fourth Circuit in *Ocean Acres Ltd. Partnership v. Dare County Bd. of Health*, 707 F.2d 103, 105 (4th Cir. 1983), *aff'g*, 514 F. Supp. 1117, 1120 (E.D.N.C. 1981), held that direct takings claims may be brought in addition to whatever relief may be available under § 1983. But respondent asserts that *Ocean Acres* is "of limited utility" because the subsequent Fourth Circuit decision in *Hunt v. Robeson County Dep't of Social Svcs.*, 816 F.2d 150, 152 n.2 (4th Cir. 1987)—a case that did *not* involve a takings claim—held that constitutional claims against local governments could only be

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[1] The fact that *state* governmental entities, as opposed to local ones, *cannot* be held liable for damages under § 1983, *Quern v. Jordan*, 440 U.S. 332 (1979), also strongly supports the conclusion that Congress did not intend § 1983 to eliminate the direct right of action for takings claims, which may be asserted against either state or local governments that take private property without just compensation.

pursued under § 1983. *Hunt*, however, only adds to the confusion because it does not address *Ocean Acres*, and subsequent to *Hunt* the Fourth Circuit affirmed yet another district court decision holding that takings claims may be brought directly under the Constitution. *See Jackson v. City Council of Charlottesville*, 659 F. Supp. 470, 474 (W.D. Va. 1987), *aff'd in relevant part*, 840 F.2d 10 (4th Cir. 1988).

Respondent also contends that *Bieneman* and *Ocean Acres* are nothing more than anomalies arrayed against an otherwise solid and well reasoned body of precedent from other circuits. Opp. at 15. The cases that respondent cites do not, however, support that contention. Other than the Ninth Circuit's decision here, Azul is aware of *no* other court in a takings case ever to have held that § 1983 is the exclusive vehicle for a takings remedy, and respondent has not identified a single such case. Although several circuits, like the Fourth Circuit in *Hunt*, have employed sweeping language outside the takings context that could be interpreted to mean that *all* constitutional claims must be brought under § 1983, *see* Pet. at 17-18, only the Sixth Circuit's decision in *Thomas v. Shipka*, 818 F.2d 496, 502-03 (6th Cir. 1987), seemed to have done so after considering the possibility that direct takings claims would be foreclosed.

2. Respondent argues that this Court, in *Wilson v. Garcia*, 471 U.S. 261 (1985), has already decided that state personal injury statutes of limitations govern direct constitutional takings claims. Opp. at 15-17. But that is not remotely correct. *Wilson* is a § 1983 case that turned on this Court's interpretation of congressional intent and did *not* address the proper limitations period for Takings Clause claims asserted under the Constitution itself.

a. This Court has flatly rejected the argument that federal courts should look reflexively to state law to fill in the interstices of federal constitutional remedies. *See Carlson*, 446 U.S. at 24-25 n.11. Borrowing state law in § 1983 cases is compelled by 42 U.S.C. § 1988, which expressly "requires that § 1983 actions be governed by 'the common law, as modified and changed by the constitution and statutes of the

State wherein the court having jurisdiction of [the] civil cause . . . is held . . . .' " *Id.* at 24 n.11. However, § 1988 "does not in terms apply" to direct constitutional claims, *id.*, and "there are cogent reasons not to apply it even by analogy." *Id. See* Pet. at 22-25.

Application of state personal injury statutes of limitations to direct takings claims would, for example, result in anomalous, absurd and utterly capricious results. While a regulatory takings claim based on a mobile home rent control ordinance brought in California state court would be subject to the specific five-year state-law statute of limitations that applies to takings claims, *Colony Cove Ass'n v. City of Carson*, 10 Cal. App. 4th 1646, 92 Daily Journal D.A.R. 15558, 15560 (1992), the exact same claim brought in federal court would, according to respondent, be governed by California's one-year limitations period for "personal injury" actions. In other words, federal takings claims filed in state court would be subject to a state statute of limitations developed specifically for such claims, while the same claim filed in federal court in the same state would be governed by that state's personal injury statute of limitations.

b. Respondent further contends that the *Wilson* analysis is dispositive here because all "[c]onstitutional violations are torts." Opp. at 14 n.8, 16. But takings claims are distinctly *not* tort-based and are not even remotely analogous to personal injury actions for tortious conduct. Indeed, whereas the law of torts perceives as wrongful certain types of conduct, the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . . This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 314-15 (citations omitted) (emphasis in original). It is precisely this unique feature of the right created by the Fifth Amendment that has led some courts, including the district court here, to conclude that statutes of limitations do not extinguish takings claims altogether but simply limit

the amount of "just compensation" that may be recovered. Pet. App. at 42a; *see, e.g., Ocean Acres*, 514 F. Supp. at 1123.

3. Respondent also argues that Question 4 of the petition regarding when a takings claim accrues for statute of limitations purposes presents mere "factual" issues that are not suitable for review by this Court. Opp. at 18-19. However, the Ninth Circuit on rehearing reiterated and relied on the straightforward, inflexible and manifestly incorrect rule of law concerning accrual established in *De Anza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991), to bar Azul's takings claims.

De Anza not only is a "physical" takings case that was "implicitly overruled," Pet. App. at 27a, by *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), but the rule that it articulates—that a takings "cause of action accrue[s] when the ordinance at issue was enacted" (Pet. App. at 26a)—is materially inconsistent with the accrual principles articulated by this Court in *United States v. Dickinson*, 331 U.S. 745, 748 (1947). *Dickinson* rejected a similar approach and held that "[t]he Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *Id.* at 748.

The *De Anza* rule also squarely conflicts with the recent decision of the California Court of Appeal in *Colony Cove Ass'n v. City of Carson*, 10 Cal. App. 4th 1646, 92 Daily Journal D.A.R. 15558 (1992). *Colony Cove* involved a regulatory takings challenge to a local mobile home rent control ordinance almost identical to the Los Angeles RSO at issue here. The *Colony Cove* court rejected the defendant's argument that the California five-year limitations period had begun to run ten years earlier when the ordinance was enacted, 92 Daily Journal D.A.R. at 15560, refusing to "adopt the City's position that appellant is forever barred from challenging the constitutionality of the Ordinance even though the alleged wrong is continuing," because "the continued enforcement of an unconstitutional statute cannot be insu-

lated by the statute of limitations." *Id.* The court in *Colony Cove* thus held that

> each sale of a [mobile home] constitutes a separate taking, and thus creates a discrete cause of action upon which appellant may sue .... Accordingly, a new limitations period commenced with the sale of each [mobile home] located in the Park, and appellant's claim[s] for damages are limited to those [mobile homes] sold within the five-year period prior to the time it filed its complaint.

Id. (citations omitted). That is precisely the approach that the district court took and the Ninth Circuit rejected in this case. *See* Pet. App. at 16a, 42a, 57a, creating the same kind of conflict between state and federal courts in California that prompted the Court to grant review in *Yee*. *See* 112 S. Ct. at 1534.

4. Although respondent does not dispute the importance of the regulatory takings issue left open in *Yee*, it argues that the Court should, for "prudential reasons," refrain from resolving that issue in this case. Respondent's efforts to shield the Los Angeles RSO from scrutiny are, however, predicated on distortions of the record below and a serious misunderstanding of this Court's cases.

a. Respondent first contends that the Court should not review the regulatory takings issue because Azul purportedly did not raise it below. However, as Azul has demonstrated, Pet. at 4-5, its complaint broadly raised a claim that the Los Angeles RSO, in conjunction with the California Mobile Home Residency Law, "effect[ed] a taking of [Azul's] property for public use and benefit without payment of just compensation." Complaint ¶ 10, at 3; *see* Opp. App. A at 3. Under *Yee*, this was more than sufficient to preserve the regulatory takings question. 112 S. Ct. at 1532 ("Having raised a taking claim in the [lower] courts, ... petitioners could have formulated any argument they liked in support of that claim here.").

Moreover, *respondent* itself raised and argued the regulatory takings issue both in the district court, *see, e.g.*, App.

A, *infra*, 1a-5a, and in the Court of Appeals, *see, e.g.*, App. B, *infra*, 6a-9a. As a result, the district court analyzed that issue at "great lengths," Opp. at 7, and decided it. Pet. App. at 43a-46a. And the Court of Appeals likewise necessarily addressed the regulatory takings issues in its initial opinion, resolving some issues in favor of Azul and some in favor of respondent. *See* Pet. at 9-12.[2]

Thus, the record below is well-developed and there is no reason for the Court to refrain from addressing the undoubtedly important issues left open in *Yee*. 112 S. Ct. at 1534. Since *Yee*, California courts have reached results that not only differ from the Ninth Circuit's analysis of the regulatory takings issues in this case, but that also contradict each other. *Compare Colony Cove*, 92 Daily Journal D.A.R. at 15559 *with Sandpiper Mobile Village v. City of Carpinteria*, 10 Cal. App. 4th 542, 547-50 (1992). The Court should grant review to clarify the regulatory takings factors articulated in *Yee* and to determine whether the Los Angeles RSO has "'go[ne] too far' "[3] and taken Azul's property.

b. Finally, respondent contends that Azul's regulatory takings claim is not ripe for review because it has not exhausted state administrative and judicial procedures for seeking just compensation. Opp. at 23-24. But such procedures were neither available nor adequate, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985), and invocation of those procedures was not necessary here. Indeed, in *Yee*, the Court made

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[2] Respondent's perplexing argument (Opp. at 21-22) that Azul was somehow required to raise in a "cross-appeal" the regulatory takings issues decided against it by the district court and Court of Appeals completely misses the mark. Because Azul prevailed on its takings claim in the district court, it was entitled "without taking a cross-appeal, [to] urge in support of [the] decree any matter appearing in the record, although [its] argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it," *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924), and also is entitled to advance such arguments on certiorari in this Court.

[3] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

clear that Azul was not required to exhaust state administrative remedies to proceed with its "*facial* challenge to the ordinance." 112 S. Ct. at 1532 (emphasis in original). Moreover, as the California Court of Appeal in *Colony Cove* recently held, "[i]t is preposterous to contend" that Azul was required to request "a rent increase . . . after the sale of each [mobile home]," because the incoming tenant, "by paying the 'premium,' has already paid the equivalent of advance rent to the former tenant." 92 Daily Journal D.A.R. at 15560. Accordingly, "[a]n application for a rent increase in these circumstances would be a patently absurd and obviously futile gesture," and the court refused to "require such folly." *Id.*

Nor was Azul required first to seek relief in the California courts before seeking relief from the federal district court. As the court below held in its initial opinion, Pet. App. at 4a-5a, and respondent acknowledges, Opp. at 23 n.12, at the time Azul filed its complaint, the California courts did not recognize either the physical takings theory of recovery *or* the regulatory takings claim subsequently recognized in *First English*. And the "futility of a state court action satisfies the second *Williamson* ripeness requirement: Property owners in this type of case can file immediately in federal court." Pet. App. at 5a.

CONCLUSION

For the foregoing reasons, and the reasons stated in Azul's petition for writ of certiorari, this Court should grant a writ of certiorari.

Dated: December 29, 1992

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV-87-02287-LEW-(Gx)

AZUL PACIFICO, INC., a California corporation,
Plaintiff,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant.

Trial:
Date: January 11, 1990
Time: 9:00 a.m.
Place: Courtroom 4

DEFENDANT'S TRIAL BRIEF

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* * *

III

THE ORDINANCE SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST.

* * *

A. Rent Control Is Within The City's Police Power.

The law is well-settled that a rent control ordinance is a proper subject within the City's legislative police power. *Block v. Hirsch*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Pennell v. City of San Jose*, 485 U.S. ___ , 108 S.Ct. 859, 99 L.Ed. 2d 1 (1988). Preventing unreasonable rent increases caused by the City's housing shortage is a legitimate exercise of the City's police power. *Pennell v. City of San Jose, supra*, 108 S.Ct. 849, 858 (1988). As the Supreme Court in *Pennell* stated:

> "... we have long recognized a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. ... (one purpose of rent control is 'to protect persons with relatively fixed and limited incomes, consumers, wage earners ... from undue impairment of their standard of living')". *Pennell* at 858. (Citations omitted).

B. The 1982 and 1984 Provisions Of The Rent Stabilization Ordinance Substantially Advance A Legitimate State Interest.

The RSO's objectives are clearly set forth in its Declaration of Purpose:

> "There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor.
>
> Tenants displaced as a result of their inability to pay increased rent must relocate but as a result of

> such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a consequence must expend less on other necessities of life."
>
> * * *
>
> "Therefore it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units." (Exhibit 334.)

The test to determine whether an ordinance substantially advances a legitimate state interest was stated in *Hall* as follows:

> "The test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it 'rationally could have believed that the act would promote its objective' ". 833 F.2d at 1280.

As set forth in the aforementioned Declaration of Purpose, the City Council enacted the RSO to regulate rents so as to "safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units."

The City Council files will show that, as applied to mobilehome parks, this purpose is met. The City Council files reveal the purpose behind the 1982 and 1984 amendments to the RSO restricting increases upon the sale of a coach. One of the purposes for the 10% limit on rent increases upon coach sales was to "more fairly apportion any economic gains between the mobilehome park owner and mobilehome coach owner" which results from the sale of a mobilehome which remains on its pad, while still preventing excessive post sale rent hikes from mobilehome spaces which could prevent the sale of the unit". (Exhibit 292-

8.) The Governmental Operations Committee of the City Council noted that tenants who testified before them felt that if there were no controls preventing mobilehome park owners from raising the coach rent upon sale, the park owners would be free to raise the rent to "prohibitive levels". The City Council found that:

> "The tenants feel that it would be virtually impossible to sell their mobilehomes if they wished to move if vacancy decontrol was in effect. This would be because vacancy decontrol would permit the mobilehome park owner to raise the rent to what prospective buyers might feel was "prohibitive." Exhibit 292-8, p. 2.

The legislative history shows that the 10% cap on rent increases upon resale was a compromise between landlords and tenants to allow landlords some rental increase at the same time protecting mobilehome tenants from potentially losing their economic investment. This type of regulation is lawful because "[s]tates have broad police power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Pennell vs. City of San Jose*, 108 S.Ct. 849, 858 (1988). Thus, the City Council's restriction upon the landlord's ability to strip away a mobilehome tenant's investment is a legitimate exercise of its police power.

The legislative history behind the RSO will also show that the underlying purpose of "vacancy decontrol" in general has been to provide an incentive for apartment owners to maintain their housing and make the necessary repairs. (Exhibits 303-1, p. 6, 316-2, pp. 3-4, 316-7, 318-1, p. 9, 318-2, p. 10, 321-4, p. 5 (Motion 8A)). The City Council reasoned that if landlords of conventional housing could anticipate raising rent to market upon a vacancy, they would more likely use a portion of that money to make repairs on their property. Since mobilehome parks, by their nature, do not require the same level of maintenance as

apartment buildings because the coaches are maintained by their owners, (Exhibit 321-4, p. 5.) a similar provision with respect to mobilehomes was unnecessary.

* * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-55853

AZUL PACIFICO, INC., a California Corporation,
Plaintiff and Appellee,

vs.

CITY OF LOS ANGELES, a Municipal Corporation,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. CV-87-02287-LEW
The Honorable Laughlin E. Waters, Judge

APPELLANT'S OPENING BRIEF

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* * *

V. Regulating the Economic Relations Between Landlords And Tenants Has Historically Been Viewed As A Constitutional Exercise of Police Powers.

Up to now, rent control has traditionally been upheld as a constitutionally valid form of price control to protect tenants as consumers. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). Eviction controls have also been upheld, *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921), and have specifically been found not to constitute permanent physical occupations. *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3rd Cir. 1984). The notion that such controls constitute a "physical occupation" has also been previously rejected by the Supreme Court. *Fresh Pond Shopping Center Inc. v. Callahan*, 446 N.E. 2d 1060 (Mass. 1983), *app. dism.* 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983).

Pennell, in reaffirming the high court's rule that rent control is per se constitutional, specifically recognized that:

> "the Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly." 485 U.S. at 11.

The *Pennell* court acknowledged that preventing excessive rents caused by the housing shortage in the City of San Jose was a legitimate exercise of the City's police powers.

The factors that the *Pennell* court considered to find the San Jose ordinance constitutional are the same factors that exist here. Judge Waters specifically found that "there is a shortage of low cost housing in the City of Los Angeles, including mobile home rental space." (C.D. 138, 4:11-13). The court found that in the past the shortage has "led to abuses of mobile home park tenants by landlords." (C.D. 138, 4:12-14) Most tellingly, the court found that the economic climate surrounding mobile home parks in Los Angeles was one which was "distorted" with demand far exceeding supply (C.D. 138, 19:23-27), resulting in a "mo-

nopoly, which is market *failure.*" (Emphasis in original) (C.D. 138, 22:6-7). Thus, the court reasoned that the City has a legitimate state interest in regulating the mobile home park industry, which it termed "a prime candidate for government regulation." (C.D. 138, 22:6-8). However, the court felt constrained by the holding of *Hall*, which it considered binding.

Mobile home coach tenants have a "significant financial investment" in their tenancies, unlike apartment dwellers. They purchase their coach, most often through financing arrangements with lenders. If they could be forced to move or suffer huge, unaffordable rent increases at the whim of the landlord, tenants would be forced to move in an uncertain market where spaces are few and far between.

Rent regulation is needed because there is a housing shortage. The RSO's rent regulation was designed to address two results of that shortage, unreasonable rents and the forced sale of coaches at distress prices. The RSO's annual rent provisions address the first evil while the cap on rental increases address the latter.[1]

The California Supreme Court in *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside*, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984) was once confronted with the same argument presented in *Hall*. The mobile home owners association argued that the ordinance in *Oceanside*, by limiting rent increases, combined with the California Mobilehome Residency Law (Civil Code 798.74), assures that:

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[1] In *Azul* testimony was presented that the market value for ocean view sites was $1200.00 per month. (Tr. Ex. 435, 4:8) Tenants at the Park testified that at the time they purchased their coach, if the rents had been as high as $1,000.00, they would not have purchased at all. (R.T. III, 77:16-78:2, 97:12-18, 106:1-10) Since the majority of mobile home renters are seniors on fixed incomes they have only so much money to spend on housing. Consequently, if potential tenants cannot afford to rent, existing tenants in the Park will be unable to sell at all or at distressingly low prices resulting in a loss in their investment, including its on-site value. This result was exactly what the City sought to avoid with its rent control provision. (Tr. Ex. 292-8).

> "A selling tenant with a favorable rent-controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in a unregulated park of identical quality where higher rents were being charged." 157 Cal.App.3d at 907.

Thus, the landlords argued, a valuable interest of the existing tenant was being sold to a new tenant resulting from the "combined effect" of the state law and the city's ordinance. Yet, the California Supreme court reasoned that where "the ordinance is structured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors", At 907, the ordinance is constitutional. In line with the *Pennell* thinking four years later, the court reasoned that:

> "Rent control attempts to restore free market conditions by limiting rent increases to that level which would occur under general market conditions—a competitive housing market as opposed to a monopolistic or oligopolistic one." 157 Cal.App.3d at 905.

The City's ordinance seeks to do nothing more than this. To do anything less leaves the City's mobile home tenants in a position where they again, are at the mercy of the landlord's pricing policies. To extend *Hall* to the RSO's mobile home rent regulations will deprive tenants of the protection that traditionally rent controls have sought. To this end, the City urges the court to re-examine *Hall*,[2] in light of its application here and in light of the judicial precedent involving price regulation, and reverse *Azul*.

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[2] If after this court examines *Hall* it finds it must overrule *Hall*, the City would invite the court to do so.